

USING COMMUNICATION CUES TO EVALUATE PROSPECTIVE JURORS DURING THE VOIR DIRE*

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The selection of a jury is one of the most important parts of a jury trial and is often central to the final outcome.¹ Consequently, the effective use of voir dire is a crucial part of any trial lawyer's skills. There are a number of purposes the voir dire may serve. For example, the attorney may use it to ingratiate himself or to indoctrinate prospective jurors.² Although attorneys engage in both strategies, neither are judicially sanctioned.³ The acceptable purposes of voir dire are to determine whether prospective jurors should be eliminated from the jury for cause and to allow the attorneys to obtain information upon which they can base their peremptory challenges.⁴

Considering the acceptable purposes only, the attorneys' task during the voir dire is to obtain sufficient information from the prospective jurors to identify those individuals that the attorneys feel are prejudiced or biased against their client or who will not be receptive to

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1. See Hauwrich & Tate, *Determinants of Jury Selection*, 39 SASK. L. REV. 285, 285 (1974-75).

2. See A. CONE AND V. LAWYER, *THE ART OF PERSUASION IN LITIGATION*, §§ 8.2, 8.4, 8.7, 8.10, 8.12 at 256-58, 260-62 (1966); Blunk & Sales, *Persuasion During the Voir Dire*, in *PSYCHOLOGY IN THE LEGAL PROCESS* 39, 43-44 (B. Sales ed. 1977); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 521-28 (1965); Rothblatt, *Techniques for Jury Selection*, 2 CRIM. L. BULL., No. 4 at 14, 14-17, 21-22 (1966).

3. See BLUNK & SALES, *supra* note 2, at 40.

4. See Hare, *Voir Dire and Jury Selection*, 29 ALA. LAW. 160, 160 (1968).

the arguments they wish to raise in the trial. The attorneys must then exercise their challenges for cause or peremptory challenges in order to remove these undesirable prospective jurors. Ideally, when this process of elimination is carried out by counsel for both sides of the lawsuit, a fair and impartial jury is secured.

In order to make an intelligent use of the challenges at their disposal, the attorneys must know how each prospective juror feels in regard to: (1) counsel for both sides; (2) the opposing litigants; and (3) the legal and factual issues that will be raised at trial. Unfortunately, the attorneys will usually encounter obstacles that prevent them from acquiring much of the information they desire. In the federal courts, and in an increasing number of state courts, for example, the trial judge will usually conduct most of the questioning and may not probe into desired areas of information or may not probe deeply enough to satisfy the attorney. The attorneys may also be hampered in acquiring information from prospective jurors by the constraints of time—either by the time limits imposed on the voir dire by the trial judge or by self-imposed limitations adopted to avoid antagonizing prospective jurors with lengthy questioning. Furthermore, the practice of questioning prospective jurors in open court and in the presence of other jurors may inhibit their self-disclosure and encourage socially desirable, conforming responses. As a result of these limitations, the attorney is frequently forced to exercise his challenges on the basis of incomplete information and inference.

To assist the attorneys in their predicament, a number of writers have advocated systems to guide the attorney in his evaluation of prospective jurors. These systems employ various methods ranging from stereotypic notions based on ethnicity and occupational backgrounds to using criteria generated by a sophisticated demographic and attitudinal survey of the community in which the trial is to be held.⁵ The present Article will focus on a new method that can be used to evaluate prospective jurors on the basis of their communicative behaviors. Unlike some other methods, this procedure focuses on the particular individual in the courtroom rather than abstract socio-economic groups in the community. It relies solely on behavior observed during the voir dire.

WHAT ARE THE COMMUNICATIVE BEHAVIORS OF JURORS?

Communicative behaviors can be classified in terms of three dimensions: verbal, paralinguistic, and kinesic. The verbal dimension consists of the words which are actually spoken and their syntactical

5. For a review of these systems, see Suggs & Sales, *The Art and Science of Conducting the Voir Dire*, 9 J. PROFESSIONAL PSYCH. 367 (1978).

arrangement. The paralinguistic dimension consists of aspects of speech—such as breathing, pauses and latencies, pitch and tone of voice, and speech disturbances—that are not actually concerned with words or sentences.⁶ In other words, when we look at paralinguistics, we are interested in *how* something is said rather than *what* is said. Kinesic behavior, or body language, consists of such behaviors as facial expressions, body movements, body orientation, eye contact, and hand movements.

The legal training of attorneys most probably enables them to be particularly astute at analyzing the verbal component of an individual's communicative behaviors. But it is doubtful that they consciously and systematically attend to the prospective juror's paralinguistic and kinesic behaviors. This omission is unfortunate because, for the purposes of the voir dire, the nonverbal cues may be the most important part of a prospective juror's behaviors. This is so because psychological and communication research indicates that verbal behavior is used for communicating about events external to the speakers (a function which is appropriate in the examination of witnesses), while nonverbal cues are used to establish and maintain interpersonal relationships, to communicate interpersonal attitudes, to express emotion, and to make a presentation of the self.⁷

Furthermore, Ekman and Friesen have demonstrated that through their nonverbal behavior people "leak" their true feelings and provide clues that deception is taking place.⁸ This latter point is particularly important in light of Broeder's conclusion that "jurors often, either consciously or unconsciously, lie on voir dire."⁹ Since emotions, attitudes, and clues of deception are transmitted primarily through the nonverbal channels of communication, a systematic analysis of the nonverbal behaviors presented during the voir dire should be a fruitful method by which the attorney could determine a prospective juror's suitability to serve.

The analysis of nonverbal communicative behaviors discussed here is *not* of the type proposed by the popular literature. Much of that literature advances the notion that particular gestures and movements

6. See generally Pittenger & Smith, *A Basis for Some Contributions of Linguistics to Psychiatry*, 20 PSYCH. 61, 69-74 (1957).

7. See generally M. ARGYLE, *SOCIAL INTERACTION* (1969); Hunt & Kan Lin, *Accuracy of Judgements of Personal Attributes from Speech*, 6 J. PERSONALITY & SOCIAL PSYCH. 450, 453 (1967); Mehrabian & Ferris, *Inference of Attitudes from Nonverbal Communication to Two Channels*, 31 J. CONSULTING PSYCH. 248, 248-49, 251 (1967); Mehrabian & Wiener, *Decoding of Inconsistent Communications*, 6 J. PERSONALITY & SOCIAL PSYCH. 109, 113-14 (1967).

8. Ekman & Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCH. 88, 88 (1969); Ekman & Friesen, *Detecting Deception from the Body or Face*, 29 J. PERSONALITY & SOCIAL PSYCH. 288, 294-297 (1974).

9. Broeder, *supra* note 2, at 528.

have very specific meanings. This may be so within individuals, but the research literature indicates that different people will exhibit different communicative behaviors, and that the meaning of the various nonverbal behaviors exhibited is idiosyncratic rather than universal in nature.¹⁰ The literature also reveals, however, that there are some common nonverbal indicators of emotion and situational anxiety; it is these behaviors that are important to the attorney and on which we will focus our attention in succeeding sections of this Article.

THE RATIONALE FOR ANALYZING COMMUNICATIVE BEHAVIORS

Consider again the plight of attorneys during voir dire. They need to determine whether the prospective juror is more favorably disposed toward one side than another and whether the juror is making truthful responses to the questions proposed. There are several assumptions we can make. First, it is reasonable to assume that the prospective juror will feel relatively more anxiety when being questioned by an attorney whom the juror regards with disfavor or who represents a client toward whom the juror has a negative bias. Second, anxiety also should manifest itself when the juror is being questioned about sensitive issues on which he has strong feelings (e.g., racial prejudice, death penalty, "law and order"). Finally, it is reasonable to assume that a juror will feel anxiety, unless he is a pathological liar, when he is being deceptive in response to questioning. The anxiety which the juror feels in each of these cases is situational anxiety—that is to say, the anxiety is generated by the particular situation at hand rather than being a stable personality trait of the individual. Research indicates that it is precisely this situational-type anxiety that is made manifest in the individual's communicative behaviors. Thus, a careful and systematic analysis of these behaviors could yield valuable insights into the individual's feelings and dispositions toward the various sides of the lawsuit, the issues, and the litigants. This is especially true when counsel can question jurors within each of these areas.

The balance of this Article will describe the various behaviors that are indicative of emotional affect and situational anxiety and will then conclude by presenting a systematic method for analyzing those behaviors (i.e., evaluating a juror's desirability).

10. Krause, *Anxiety in Verbal Behavior: An Intercorrelational Study*, 25 J. CONSULTING PSYCH. 272, 272 (1961).

COMMUNICATIVE BEHAVIORS INDICATIVE OF EMOTION AND/OR SITUATIONAL ANXIETY

Paralinguistic Cues

Speech disturbances. One of the manifestations of situational anxiety is in the area of speech disturbances. These phenomena have been studied by numerous investigators. Dibner found that the speech patterns of unfinished sentences, breaking in with new thoughts, self-interrupted sentences, repeating words or phrases, stuttering, saying "I don't know" not in answer to a question but as in resignation or disgust, sighing or taking deep breaths, inappropriate laughter, voice changes, questioning the interviewer, and blocking (unusual hesitation) are clearly related to situation anxiety and not to anxiety as an overall personality characteristic.¹¹ This finding has been substantiated by many other investigators.¹²

The increase in speech disturbances under anxious conditions for the interviewee is substantial. Mahl found that during anxious phases of interviews, the average increase in speech disturbances was twenty-nine percent.¹³ Cook found that when the areas of interviews generating anxiety were identified and pursued by further questioning, the speech disturbances increased markedly even though the severity of questioning was mild.¹⁴

Not only is there an increase in speech disturbances when the interviewee feels anxious, but the whole character of speech changes. For example, Price and Eldred found that when an interviewee feels anxious, his speech becomes more stilted and stereotyped with less differentiated word usage.¹⁵ Thus, if a prospective juror had been responding to questioning in an informal manner and switched to a more formalistic and pompous style when questioned about his attitudes toward racial minorities, it could well be that the juror feels some anxiety about the subject matter and is perhaps being deceptive in his answers.

Amount of speech. A number of investigators have found that people tend to talk longer with people toward whom they have positive

11. Dibner, *Cue-Counting: A Measure of Anxiety in Interviews*, 20 J. CONSULTING PSYCH. 475, 477 (1956).

12. See, e.g., Eldred & Price, *A Linguistic Evaluation of Feeling States in Psychotherapy*, 21 PSYCH. 115, 115-21 (1958); Kasl & Mahl, *The Relationship of Disturbances and Hesitations in Spontaneous Speech to Anxiety*, 1 J. PERSONALITY & SOCIAL PSYCH. 425, 430 (1965); Mahl, *Disturbances and Silences in the Patient's Speech in Psychotherapy*, 53 J. ABNORMAL & SOCIAL PSYCH. 1, 11-13 (1956); Pope & Siegmán, *Interviewer Warmth and Verbal Communication in the Initial Interview*, 2 PROCEEDINGS OF THE 75TH ANNUAL CONVENTION OF THE APA 245, 246 (1967).

13. See Mahl, *supra* note 12, at 7.

14. Cook, *Anxiety, Speech Disturbances, and Speech Rate*, 8 BRIT. J. SOC. & CLINICAL PSYCH. 13, 19-20 (1969).

15. See Eldred & Price, *supra* note 12, at 117-20.

emotions.¹⁶ By examining the amount of verbal output of the prospective jurors to questions posed by the attorneys, observers could determine with which side the prospective juror feels more comfortable.

Speed of speech and breath rate. Goldman-Eisler found that people talk noticeably faster after they have been asked an anxiety-arousing question, and that the interviewee's breathing is inhibited when he feels anxious or fearful.¹⁷ This increase in the speed of speech and the inhibition of breathing could lead to noticeably labored breathing and indicate anxiety in reaction to the particular areas probed.

Pauses and latencies. A pause refers to a prolonged silence within a spoken sentence or phrase. Latency refers to the time between a question and the beginning of the interviewee's response to the question. Cassotta found that pauses and long latency periods are positively correlated with induced state anxiety and not with a personality trait type of anxiety.¹⁸ This would be another fruitful approach for aiding in the analysis of a prospective juror's responses.

Kinesic Cues

Eye contact. The variable of eye contact as it relates to state anxiety has been researched by a number of investigators. Day maintains that when an interviewee is anxious, there is a marked increase in the frequency of lateral eye movements.¹⁹ Kanfer felt that the average eye-blink increased when anxiety-arousing topics were discussed, although this increased rate declines with time.²⁰ Even more impressive is the work done in three studies, where it was discovered that when individuals are being deceitful, there is a decrease in the amount of visual interaction with others.²¹

The variable of eye contact, in addition to indicating anxiety and

16. See generally Howeler & Vrolijk, *Verbal Communication as an Index of Interpersonal Attraction*, 34 ACTA PSYCHOLOGICA 511, 514 (1970); Pope & Siegman, *supra* note 12, at 296; Wiens, Jackson, Manaugh & Matarazzo, *Communication Length as an Index of Communicator Attitude: A Replication*, 53 J. APPLIED PSYCH. 264, 264-65 (1969); Worth, Gary & Kahn, *Self-Disclosure as an Exchange Process*, 13 J. PERSONALITY & SOCIAL PSYCH. 59, 61 (1969).

17. Goldman-Eisler, *Speech-Breathing Activity—A Measure of Tension and Affect During Interviews*, 46 BRIT. J. PSYCH. 53, 60-62 (1955).

18. Cassotta, *The Stability and Modification of the Vocal Behavior of Individuals in Stress and Nonstress Interviews*, 27B DISSERTATION ABSTRACTS 2867, 2868 (1966).

19. Day, *An Eye-Movement Indicator of Type and Level of Anxiety: Some Clinical Observations*, 23 J. CLINICAL PSYCH. 438, 439 (1967).

20. Kanfer, *Verbal Rate, Eye Blink, and Content in Structured Psychiatric Interviews*, 61 J. ABNORMAL & SOCIAL PSYCH. 341, 345-46 (1960).

21. Ekman & Friesen, *Nonverbal Leakage and Clues to Deception*, in NONVERBAL COMMUNICATION 269, 279 (S. Weitz ed. 1974); Exline, Thibaut, Brannon & Gumpert, *Visual Interaction in Relationship to Machiavellianism and an Unethical Act*, 16 AM. PSYCHOLOGIST 396, 396 (1961); Mehrabian, *Nonverbal Betrayal of Feeling*, 5 J. EXPERIMENTAL RESEARCH IN PERSONALITY 64, 70-73 (1971). An exception to this general proposition is the finding by Exline et al., *supra*, that people high in machiavellianism maintain as much eye contact when they are lying as when they are telling the truth.

deceitful behavior, can also be used to define the type of relationship which exists between two people. A number of investigators have found that increased eye contact indicates a positive feeling toward an individual.²² Closely related to this finding are the results of Efran's work in which he found that individuals maintain more eye contact with people of whom they have a high expectancy of approval.²³ Efran's work is particularly important because of the nature of the voir dire. The average prospective juror enters the voir dire knowing none of the parties concerned, and thus should have no feelings, either positive or negative, toward any of the participants. His relative eye contact with the different attorneys, however, will indicate from whom he *expects* approval and a positive relationship. It is reasonable to assume that such an expectation of approval from an attorney representing a particular side is indicative of bias in favor of that side.

Facial cues. All of us, to some extent, attempt to read facial cues when we are trying to understand a person's true feelings. It is difficult to verbally specify exactly which expressions are indicative of which emotions, but there is considerable evidence to indicate that our common sense opinions of what constitutes negative or positive emotions in the face are indeed valid.²⁴ Ekman did a cross-cultural study and found that people universally attribute similar facial expressions to the emotions of happiness, sadness, anger, surprise, disgust, and fear.²⁵ These facial expressions arise spontaneously when people are involved in verbal behavior.²⁶

The utility of using the facial cues of prospective jurors during the voir dire to analyze their responses is underscored by the work of Mehrabian and Ferris, Mehrabian, and Zaidel and Mehrabian. These investigators found that facial cues are much more effective in communicating a person's attitudes than either the verbal or paralinguistic portions (pitch, tone of voice, etc.) of the communication.²⁷ Some in-

22. See generally Argyle & Dean, *Eye Contact, Distance and Affiliation*, 28 *SOCIOMETRY* 289 (1965); Mehrabian, *A Semantic-Space for Nonverbal Behavior*, 35 *J. CONSULTING & CLINICAL PSYCH.* 248, 249 (1970); Mehrabian, *Some Referents and Measures of Nonverbal Behavior*, 1 *BEHAVIOR RESEARCH METHODS & INSTRUMENTATION* 203, 205 (1969). A word of caution is in order here. Ellsworth & Ross, *Intimacy in Response to Direct Gaze*, 11 *J. EXPERIMENTAL SOCIAL PSYCH.* 592, 608-10 (1975), have noted that a direct linear relationship between eye contact and intimacy appears to hold true only for women subjects. Males tend to view continuous eye-contact from another (particularly from other males) as threatening.

23. Efran, *Looking for Approval: Effects on Visual Behavior of Approbation from Persons Differing in Importance*, 10 *J. PERSONALITY & SOCIAL PSYCH.* 21, 24-25 (1968).

24. EKMAN, FRIESEN & ELLSWORTH, *EMOTION IN THE HUMAN FACE* 101 (1972).

25. Ekman & Friesen, *Constants Across Cultures in the Face and Emotion*, 17 *J. PERSONALITY & SOCIAL PSYCH.* 124, 128-29 (1971).

26. Ekman, *Body Position, Facial Expression, and Verbal Behavior During Interviews*, 68 *J. ABNORMAL & SOCIAL PSYCH.* 295, 301 (1964).

27. See Mehrabian, *Nonverbal Communication*, 19 *NEBRASKA SYMPOSIUM ON MOTIVATION* 107, 139-140 (1971); Mehrabian & Ferris, *Inference of Attitudes from Nonverbal Communication in Two Channels*, in *NONVERBAL COMMUNICATION* 291, 295-296 (S. Weitz ed. 1974); Zaidel &

investigators have pointed out that facial cues show *what* emotion the individual is feeling whereas body cues show the *intensity* of a felt emotion.²⁸

A note of caution must be made, however, in regard to facial cues. Ekman and Friesen have pointed out that while the face is the major site of affect displays, it is also the site which is under the most control of the individual.²⁹ Thus, if a person wished to disguise his true emotions, he could fairly easily display false emotions on his face. Body postures and movements are not as easily controlled, however, and also should be watched for signs of emotion. Fortunately, researchers have found that when the use of facial cues is precluded, body cues can be used effectively in perceiving emotional cues.³⁰ If the body cues contradict those given by the face, one must suspect deception by the prospective juror.

Body postures and movements. Body postures and movements are used by everyone whenever they interact with other individuals. Mehrabian has demonstrated that the concepts of immediacy and relaxation of body posture indicate an individual's attitude towards another person.³¹ His concept of immediacy refers to the distance between individuals, forward lean, eye contact and whether or not an individual squarely faces the person with whom he is interacting. The more immediate a person's body orientation to another the more positive is the regard shown. A person's postural relaxation is indicated by arm position asymmetry (such as one hand in the lap and the other draped over the back of a chair), side-ways lean, leg position asymmetry, hand relaxation, neck relaxation, and a slight reclining angle. The more relaxed a person's body posture when interacting with another, the more positive is the regard shown. One exception to this description must be made, however. A slight reclining angle indicates positive regard for another while an extreme reclining angle indicates a hostile or more negative attitude.

Investigators have found that body movements are indicative of

Mehrabian, *The Ability to Communicate and Infer Positive and Negative Attitudes Facially and Vocally*, 3 J. EXPERIMENTAL RESEARCH IN PERSONALITY 233, 240 (1969).

28. Ekman, *Differential Communication of Affect by Head and Body Cues*, 2 J. PERSONALITY & SOCIAL PSYCH. 726, 734 (1965); Ekman & Friesen, *Head and Body Cues in the Judgement of Emotion: A Reformulation*, 24 PERCEPTUAL & MOTOR SKILLS 711, 717-22 (1967).

29. See Ekman & Friesen, *supra* note 22, at 280.

30. See Dittmann, Parloff & Boomer, *Facial and Bodily Expression: A Study of Receptivity of Emotional Cues*, 28 PSYCH. 239, 243-44 (1965); Ekman & Friesen, *supra* note 22, at 281.

31. See Mehrabian, *Significance of Posture and Position in the Communication of Attitude and Status Relationships*, 71 PSYCH. BULL. 359, 359-71 (1969); Mehrabian, *Relationship of Attitude to Seated Posture, Orientation and Distance*, 10 J. PERSONALITY & SOCIAL PSYCH. 26, 28-29 (1968); Mehrabian, *Orientation Behaviors and Nonverbal Attitude Communication*, 17 J. COM. 324, 330-31 (1967). Mehrabian & Friar, *Encoding of Attitude by a Seated Communicator via Posture and Position Cues*, 33 J. CONSULTING & CLINICAL PSYCH. 330, 335-36 (1969).

emotional arousal.³² Still body positions occur either when there are low levels of arousal or when an act is inhibited and a tense position results. It could be safely assumed that if a prospective juror was trying to be deceptive, he would be emotionally aroused and this emotional arousal would become manifest either in an observable increase in body movements or in a tense, still body posture. Schefflen feels that postural changes serve as communication markers and can indicate changes in emotions and attitudes.³³

Hand movements. Hand movement is another variable which could be used to detect deception on the part of prospective jurors during the voir dire. Freedman and Hoffman felt that body-focused activities such as finger-tapping, wringing of the hands, and manipulating various parts of the body with the hands function to modify sensory experience and may effect the state of body tension by relieving or intensifying it.³⁴ Ekman and Friesen examined the same type of hand movements and concluded that body-focused hand activities occur when an individual is in psychological discomfort or anxiety.³⁵ An increase in the frequency of body-focused hand movements by a prospective juror could indicate that the juror feels uncomfortable with a particular attorney or that he feels anxious because he is being deceitful.

Verbal Cues

Immediacy of language. Mehrabian's concept of immediacy in interaction was first introduced in regard to body posture. He also used the concept in regard to language as a measure of the directness and intensity of interaction between the communicator and the object of his communication.³⁶ Examples of the concept of non-immediacy in language are such things as: the speaker referring to the object of communication by using demonstrative pronouns such as "that" and "those"; referring to the object in past or future tense instead of the present tense; indicating that the relationship between the communicator and the object is imposed; referring to the relationship as possible rather than actual; indicating that only one aspect of the communicator is involved with the object; indicating that a group of people, including the

32. See Ekman, *supra* note 28, at 733-34; Ekman & Friesen, *supra* note 28, at 717-22.

33. Schefflen, *The Significance of Posture in Communication Systems*, 27 PSYCH. 316, 319-21 (1964).

34. Freedman & Hoffman, *Kinetic Behavior in Altered Clinical States: An Approach to Objective Analysis of Motor Behavior During Clinical Interviews*, 24 PERCEPTUAL & MOTOR SKILLS 527, 532-33, 537-38 (1967).

35. Ekman & Friesen, *Hand Movements*, 22 J. COM. 353, 359-63 (1972).

36. Mehrabian, *Immediacy: An Indicator of Attitudes in Linguistic Communication*, 34 J. PERSONALITY 26, 28 (1966).

communicator, is related to the object; and indicating that a group of objects including the object is related to the communicator.

Mehrabian and others have concluded that communications about affectively or evaluatively negative people or events contain more non-immediacy than communication about positive events or people.³⁷ The essential point which Mehrabian is making is that a style of language which places distance between the speaker and the topic of conversation indicates that the speaker feels negatively toward the topic of conversation. As an example of non-immediacy in language, consider the situation where two prospective jurors are questioned about any bias they may have against blacks. Juror 1 responds, "No, I don't think I'm prejudiced against blacks," while Juror 2 responds, "No, I don't think I'm prejudiced against those people." Mehrabian would assert that Juror 2 is exhibiting more non-immediacy (and thus, probably more negative emotions towards blacks) than Juror 1.

APPLYING THE KINESIC, PARALINGUISTIC AND VERBAL MEASURES DURING THE VOIR DIRE

If it is observed that a prospective juror's communicative behavior indicates that he is feeling situational anxiety, such a result may be because: (a) he is anxious about being questioned by anyone in such a public forum; (b) he is anxious and has a negative emotional response to the particular person who is questioning him at the time; (c) he has some strong emotional feelings related to the particular subject matter being discussed at the time; or (d) he is being deceptive in his responses and is anxious about being found out.

By isolating the cause of the juror's anxiety (or lack of anxiety), a better impression of his suitability can be formed. One method of isolating the source of the anxiety is as follows. During the initial questioning by the judge and the attorneys, the interviewers invariably start out by asking the prospective juror questions to elicit background information such as his occupation, marital status, and where he lives. These questions are unlikely to evoke emotional and deceptive responses, and thus, this phase of the questioning may be used to obtain a baseline of the juror's repertoire of kinesic, paralinguistic, and verbal behaviors in response to questioning by the particular interviewer. During this questioning, the observers rate the communicative behavior of the juror in terms of being positive or negative toward the inter-

37. Mehrabian, *Attitudes Inferred from Neutral Verbal Communications*, 31 J. CONSULTING PSYCH. 414, 416-17 (1967); Mehrabian, *Attitudes Inferred from Non-Immediacy of Verbal Communications*, 6 J. VERBAL LEARNING & VERBAL BEHAVIOR 294, 294-95 (1967); Mehrabian & Wiener, *Non-immediacy Between Communicator and Object of Communication in a Verbal Message: Application to the Inference of Attitudes*, 30 J. CONSULTING PSYCH. 420, 424-25 (1966).

viewer. The following grid is an example of how the juror's responses may be coded.

Name	J	P	D
Eye Contact	+	+	+
Facial cues	0	+	-
Body orientation	+	+	0
Body movements	0	0	-
Body posture	0	+	-
Hand movements	+	+	+
Speech disturbances	0	0	0
Pauses & latencies	0	0	0
Speech output	0	+	0
Style of language	0	+	+

Column J = Juror's responses to baseline phase of questioning by the Judge.

Column P = Juror's responses to baseline phase of questioning by the Prosecuting or Plaintiff's Attorney.

Column D = Juror's responses to baseline phase of questioning by the Defense Attorney.

The authors have found it most convenient to use the 3-point (*i.e.*, negative, neutral and positive) scaling of communicative responses illustrated above. The ratings are guided by the criteria outlined in the previous sections, but a certain degree of subjectivity is invariably introduced in assigning a particular rating. To reduce the effects of subjectivity, it is best to have at least two observers independently rate each juror.

The juror's responses on these same dimensions are again rated when the interviewer asks attitudinal questions which are relevant to the case.³⁸ These questions will vary from case to case, but, in general, will deal with the prospective juror's dispositions toward the attorneys, litigants, and the legal and factual issues of the case.

The observers compare the juror's responses *within* each interview in an attempt to determine whether the juror has positive or negative feelings toward the attitudinal issues which were discussed. In other words, the observers attempt to determine whether and at what point in the interview the juror becomes positively or negatively aroused in his communicative behavior by comparing his baseline responses with his later responses. As an example, suppose that a prospective juror had emitted favorable responses toward the interviewer (the prosecuting attorney) during the baseline phase (*i.e.*, direct eye contact, direct body orientation, relaxed body posture, an absence of body-focused hand ac-

38. Although the observers attend to the same behavioral dimensions during questioning relating to attitudes, the authors have found that it is impractical to employ a separate grid for the coding of responses to each line of questioning. The impracticality arises from the speed with which the voir dire is conducted and because attorneys frequently do not address the same questions to each juror. Our procedure during the attitudinal phase of questioning has been to note on a separate sheet of paper only the particularly revealing responses of jurors in regard to important attitudinal questions.

tivities, etc.), but when the interviewer asked him if he had formed an opinion about the guilt or innocence of the defendant, the juror said, "No," and averted his eyes, oriented his body away from the interviewer, became more tense in his body posture, and began to play with his ring. Given this large discrepancy between the juror's baseline response and his later response, it would seem fairly safe to conclude that the juror may well have an opinion as to the defendant's guilt or innocence, and that he was being deceptive in his response to the latter question. Further questioning would then be needed to probe the reason for this deception.

The observers also compare the juror's kinesic, paralinguistic and verbal behaviors *across* interviewers in an attempt to determine the juror's affective responses to the respective sides of the case. This determination merely involves a comparison of the juror's baseline behavior in response to questioning by each interviewer. Since the content of the baseline phase of questioning by each interviewer is usually very similar, differences in the juror's baseline behavior between interviewers is most probably reflective of the juror's affective response to the interviewer on an interpersonal level or as a representative of a particular viewpoint in the case.³⁹ From the observations within and across interviewers, the observers can rate the juror's suitability for either side.

PRACTICAL CONSIDERATIONS

Since the attorney who is actually conducting the voir dire must attend to his or her own performance, it will be next to impossible for him or her to make a systematic evaluation of the jurors' nonverbal behavior. Therefore, it will be necessary for the lead attorney to use other observers to make the evaluations. These observers should be seated as closely as possible to the prospective jurors and positioned so that they may have a head-on view of the jurors. If the observers are seated too far away or at an angle, it will be difficult for them to distinguish between a smile and a grimace or to determine with whom the prospective juror is making eye contact. It has been the authors' experience that the best place from which to make the observations is at the counsel table. If the observers are attorneys, their placement presents no problem. If the attorney chooses to employ psychologists or psychiatrists to make the observations, a frequently raised question is whether

39. As an example, the figure reproduced earlier, at page 639, *supra*, indicates that the juror is most responsive to the prosecuting attorney and least responsive to the defense attorney. By comparing the P and D columns it is easily seen that the juror's responses to the defense attorney were less favorable on the dimensions of facial cues, body orientation, body movements, body posture and speech output. On none of the dimensions were the juror's responses more favorable to the defense attorney than to the prosecuting attorney.

and how the social scientists should be introduced; the fear being that the jurors will react negatively toward psychologists or psychiatrists. It is our position that the presence of social science observers should be fully disclosed and explained to the jurors. In post-trial interviews conducted with numerous jurors in both civil and criminal cases, we have never encountered a juror who objected to or resented the presence of social scientists during the voir dire. Furthermore, it is possible that the announced presence of social scientists may have tactical advantages. One set of researchers has speculated that the visible use of social scientists during the voir dire may give the side using them a psychological boost and demoralize the opponents.⁴⁰ They also note that it is possible that the use of an unusual technique to pick a fair jury may create a bond between the jurors and the side which has used the technique to "certify" them as fair jurors.

If the observers elect to use the rating form which was presented earlier, we recommend that twelve to fourteen rating boxes be placed on a single legal size page. Given the usual rapid pace of voir dire and the number of ratings to be made on each juror, it is easier to make the ratings on four to five large pages than to be shuffling fifty or more single rating forms.

Finally, it should always be remembered that the use of this technique involves the evaluation of communication cues. The maximum use of the technique will be achieved when jurors are questioned with a view toward eliciting as much communication as possible from them. Open-ended questioning should be used whenever possible—i.e., "What are your feelings about the death penalty?" rather than "Do you have any negative feelings about the death penalty?" If a juror expresses an opinion which is antagonistic toward the position to be taken by the attorney, the attorney should refrain from using the juror's statement as a springboard to "educate" the jury until after the remaining jurors have been questioned on the same subject. If the jurors are "educated" too early, the remaining jurors may not disclose their true opinions out of fear of giving the "wrong" answer.

CONCLUSION

During the voir dire, lawyers typically seek to evaluate the suitability of prospective jurors by analyzing the verbal content of their responses to questioning. Psychological and communications research indicates, however, that the bulk of information communicated by an individual about his or her attitudes and emotions is transmitted

40. McConohay, Mullen & Frederick, *The Use of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, 41 LAW & CONTEMP. PROB. 205, 225 (1977).

through nonverbal behavior. Since the object of the voir dire is to determine the prospective jurors' attitudes and emotions in regard to the litigants and issues in the particular case at hand, the attorney would be well advised to focus his or her attention on the prospective jurors' nonverbal behavior in response to questioning. This Article has attempted to give a description of relevant communicative behaviors and a method by which those behaviors can be analyzed to determine a juror's suitability.

The behavioral criteria described above have been derived from a considerable body of prior research. This research has consistently demonstrated that there are common nonverbal indicators of interpersonal preferences, situational anxiety, and deception. It must be remembered, however, that these empirical findings have been obtained in the context of either clinical or experimental settings. The application of these findings to the context of the voir dire rings true at an intuitive level, yet there are potential problems. Because of the public nature of voir dire and the penalties involved for testifying falsely under oath, prospective jurors may be more circumspect about revealing themselves through their nonverbal behaviors than were the experimental subjects from whom the behavioral criteria for evaluation were derived. Thus it may be that prospective jurors are so guarded in their responses that use of the behavioral criteria will be ineffective. It is also possible that the stress generated by the setting of voir dire may increase the production of nonverbal behaviors indicative of anxiety and deception to the point that the behaviors may not be properly interpretable. The heightened stress may even change the quality of the relevant behaviors as well as their quantity. On the other hand, it is possible that the stress associated with voir dire works to the advantage of a systematic evaluation of nonverbal behavior in that the prospective jurors' defenses may be so taxed that they are less capable of disguising or controlling their nonverbal behaviors. Until these questions are rigorously evaluated through empirical research, this technique must still be considered as experimental.